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No. 91-740

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

WALTER L. NIXON, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS AND AMICUS CURIAE UNITED STATES SENATE IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Constitution's commitment to the Senate of "the sole Power to try all Impeachments" renders a complaint about the trial procedures employed by the Senate nonjusticiable.

2. Assuming that this case is justiciable, whether the constitutional assignment to the Senate to "try" all impeachments prevents that body from using a committee to compile an evidentiary record for consideration by the full Senate.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-57a, is reported at 938 F.2d 239. The opinion of Judge Edwards denying a petition for rehearing, Pet. App. 84a-85a, is unreported. The opinion of the district court, Pet. App. 58a-69a, is reported at 744 F. Supp. 9.

JURISDICTION

The judgment of the court of appeals was issued on July 9, 1991. A petition for rehearing was denied on August 5, 1991. Pet. App. 83a. The petition for a writ of certiorari was filed on November 4, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 3, Clause 6, of the United States Constitution provides:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

STATEMENT

Petitioner Walter L. Nixon, Jr., a former United States District Judge for the Southern District of Mississippi, brought this action to challenge his conviction by the United States Senate on two articles of impeachment. Petitioner sued the United States, the Secretary of State, and the Director of the Administrative Office of the United States Courts, seeking an order declaring that the Senate impeachment trial rules are invalid and that he remains entitled to full pay and benefits as a district judge. The United States District Court for the District of Columbia dismissed petitioner's challenge as nonjusticiable, Pet. App. 58a-69a, and the court of appeals affirmed, *id.* at 1a-57a.[1]

1. In 1986, petitioner was convicted in federal court on two counts of making false statements before a federal grand jury, in violation of 18 U.S.C. 1623. His criminal conduct is described in the court of appeals deci-

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[1] The United States Senate participated fully in the proceedings below as *amicus curiae* and appears here also in that capacity pursuant to 2 U.S.C. 288e(a), which provides that the Senate may direct its Legal Counsel to appear as *amicus curiae* in its name "in any court of the United States * * * in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." Permission to appear is "of right" and may be denied only for untimeliness. 2 U.S.C. 288*l*(a). See S. Res. 237, 101st Cong., 2d Sess. (1990); 136 Cong. Rec. S587-S588 (daily ed. Jan. 30, 1990) (directing appearance in this case).

sion affirming that conviction, *United States* v. *Nixon*, 816 F.2d 1022 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988), the district court decision denying his motion for a new trial, *Nixon* v. *United States*, 703 F. Supp. 538 (S.D. Miss. 1988), and the court of appeals decision affirming that ruling. *United States* v. *Nixon*, 881 F.2d 1305 (5th Cir. 1989). Briefly stated, petitioner lied to a grand jury convened to investigate allegations that he had accepted an unlawful gratuity in exchange for his influence in a state criminal prosecution. See also *Report of the Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr.*, S. Rep. No. 164, 101st Cong., 1st Sess. (1989); Br. in Opp. in *Nixon* v. *United States*, No. 87-650, cert. denied, 484 U.S. 1026 (1988).

Following his criminal conviction, petitioner was suspended from the practice of law, *Mississippi State Bar* v. *Nixon*, 494 So.2d 1388 (Miss. 1986), and the Judicial Conference certified to the House of Representatives that impeachment might be warranted. The House investigated the matter, and one of its subcommittees heard seven days of testimony from nine witnesses, including petitioner. See H.R. Rep. No. 36, 101st Cong., 1st Sess. 14-15 (1989). On May 10, 1989, the House impeached petitioner on three articles for high crimes and misdemeanors. See 135 Cong. Rec. H1811 (daily ed. May 10, 1989). Articles I and II charged petitioner with giving false testimony before the grand jury, for which he had been criminally convicted. Article III charged petitioner with bringing disrepute on the federal Judiciary by making numerous false statements to the grand jury and federal investigators. See S. Rep. No. 164, *supra*, at 91-95.

2. The Senate has adopted rules of procedure for conducting impeachment trials. See Senate Manual, S. Doc. No. 1, 101st Cong., 1st Sess. (1989). Senate Impeachment Rule XI states in relevant part:

> [I]n the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall

> appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine * * *.

Id. at 186. Pet. App. 20a n.1. Under that rule, the evidence is received subject to determinations by the full Senate regarding relevance, competence, and materiality. *Ibid.* Rule XI further provides that "nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate." *Ibid.*

When the Members of the Senate received the articles of impeachment of petitioner, they took the constitutionally prescribed oath, Art. I, § 3, Cl. 6, and agreed to Senate Resolution 128, providing for appointment of an Impeachment Trial Committee. The Committee was directed, in accordance with Senate Impeachment Rule XI, to compile and report to the full Senate an evidentiary record concerning the House charges. 135 Cong. Rec. S5199 (daily ed. May 11, 1989).[2]

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[2] In June 1989, before the Committee began taking evidence, petitioner intervened in a pending civil action filed by then-Judge Alcee Hastings in the United States District Court for the District of Columbia, to attack his own impeachment proceedings. Petitioner contended that the appointment of the Committee under Rule XI violated the constitutional provision that the Senate try all impeachments. The district court denied petitioner's motion for a preliminary injunction and dismissed both judges' complaints. *Hastings* v. *United States Senate*, 716 F. Supp. 38 (D.D.C. 1989) (*reprinted at* Pet. App. 70a-78a). The district court held that petitioner's claim was nonjusticiable, stating that "[i]t is crystal clear that impeachment proceedings are wholly committed to Congress under the Constitution" and that the relief petitioner sought was "utterly foreign to our system of divided powers." 716 F. Supp. at 40, 41. The court of appeals affirmed the dismissal of the complaints on lack of ripeness grounds, without reaching the justiciability issue. See 887 F.2d 332 (D.C. Cir. 1989) (Table); No. 89-5191 (D.C. Cir. Oct. 18, 1989), slip op. 2 (*reprinted at* Pet. App. 79a-82a).

The Senate Committee heard testimony over four days from ten witnesses, including petitioner.[3] Petitioner's counsel thoroughly cross-examined the witnesses called by the House impeachment managers, but chose to call no witnesses other than petitioner and certain character witnesses. In October 1989, the Committee reported to the Senate a record of its proceedings. As provided by Senate Resolution 128, the Committee also gave "to the Senate a statement of facts that are uncontested and a summary, with appropriate references to the record, of evidence that the parties have introduced on contested issues of fact." *Hearings Before the Senate Impeachment Trial Comm.: Report on Articles Against Judge Walter L. Nixon, Jr. (S. Hrg. 247)*, 101st Cong., 1st Sess. Pt. 1, at 4 (1989). In accordance with its instructions, the Committee report made no proposed findings on contested issues of fact and made no recommendations regarding disposition of the impeachment articles. See generally S. Rep. No. 164, *supra*; Pet. App. 20a.

Both petitioner and the House impeachment managers filed extensive briefs on issues of fact and law, which were distributed to all Senators. On November 1, 1989, the full Senate set aside three hours for both sides to present arguments. Petitioner divided his time with his attorney and personally addressed the full Senate for approximately 30 minutes. 135 Cong. Rec. S14,502-S14,504 (daily ed. Nov. 1, 1989). His counsel was given as much additional time as he required to present his points, *id.* at S14,511, an offer that petitioner himself declined. *Id.* at S14,504. At no point during the afternoon of argument did petitioner or his counsel attempt to persuade the Senate to exercise its discretion to send for any particular witnesses to testify before the full Senate. At the end of the arguments, a number of Senators posed questions to the parties or their counsel, and petitioner per-

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[3] The Committee's proceedings were broadcast live to all Senate offices and were videotaped to enable Senators to observe the proceedings at their convenience. Pet. App. 21a.

sonally answered several of them. *Id.* at S14,513-S14,516. See Pet. App. 22a.

The Senate deliberated for six hours in closed session on the impeachment articles. See 135 Cong. Rec. S14,561 (daily ed. Nov. 2, 1989). On November 3, 1989, the Senate voted by the necessary two-thirds majority to convict petitioner on two of the three articles of impeachment. The Senate first denied petitioner's motion for "a full trial before the full Senate" by a vote of 90 to 7. *Id.* at S14,634 (daily ed. Nov. 3, 1989). It then convicted petitioner on impeachment Article I by a vote of 89 to 8 and on Article II by a vote of 78 to 19. On Article III, petitioner was acquitted because only 57 Senators voted to convict—less than the two-thirds majority required for conviction. *Id.* at S14,635-S14,636. See Pet. App. 22a.

3. Petitioner subsequently filed this action alleging that the Senate's trial procedures violate the constitutional provision that the Senate "try" all impeachments. The district court granted respondents' motion to dismiss the complaint as nonjusticiable, concluding that petitioner "has not established the kind of clear violation of a specific constitutional requirement which would trigger judicial authority to review a solemn and serious Senate action." Pet. App. 66a. The court concluded that the "opportunity to present and cross-examine witnesses before the Committee and the opportunity to argue both personally and by counsel before the full Senate" undermined petitioner's claim of a justiciable "departure from the Constitution's textual commitment to the Senate of the 'sole Power to try all Impeachments.' " *Id.* at 68a.

The court of appeals affirmed. In the opinion for the court, Judge Williams concluded that the text of the Constitution, which gives the Senate "the sole Power to try all Impeachments," Art. I, § 3, Cl. 6, commits the impeachment trial process exclusively to that body and renders legal actions challenging the Senate's procedures nonjusticiable. Pet. App. 4a, 8a, 10a. He found that the history of the Constitution's impeachment provisions, as

reflected in the Records of the Convention and the Federalist Papers, further demonstrated that "the framers simply assumed that courts had nothing whatever to do with impeachments." *Id.* at 8a.[4] Judge Williams concluded that the textual commitment of impeachment trials to the Senate, buttressed by that history, justified invocation of the political question doctrine of nonjusticiability. *Id.* at 10a-15a.[5]

Judge Randolph filed a concurring opinion. Pet. App. 16a-18a. Like Judge Williams, he concluded that "the controlling question" is whether "the judiciary can pass upon the validity of the Senate's procedural decisions." *Id.* at 16a, 18a. Judge Randolph reasoned that "[t]he 'sole power to try all Impeachments' must include the sole power to set the procedures for trial, as the Senate did here." *Id.* at 16a. If it were otherwise, "judicial review would lead to judicial control." *Id.* at 17a. Judge Randolph found it unnecessary, however, to invoke the political question doctrine to find petitioner's challenge nonjusticiable, stating: "My conclusion that the courts have no such role to play in the impeachment process ultimately rests on my interpretation of the Constitution." *Id.* at 18a.

Judge Edwards disagreed with the majority's conclusion that petitioner's claim is nonjusticiable, but con-

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[4] Judge Williams explained that the Framers relied on mechanisms other than judicial review—including the division of impeachment powers among the two Houses, the two-thirds majority requirement in the Senate, and the political accountability of members of Congress—to protect the impeachment process from abuse. *Id.* at 8a-9a.

[5] Judge Williams observed that while "textual commitment" provides the "primary reason for invoking the political question doctrine," "the need for finality also demands it." Pet. App. 13a. He explained that the Framers' commitment of final impeachment authority to the Senate, without judicial review, avoided the "chaos" that would result if impeachment proceedings against important government officers were subject to protracted judicial challenges that could undermine the authority of the officers' replacements and "confound matters indefinitely." Pet. App. 14a.

curred in the judgment. Pet. App. 18a-57a. He concluded that the courts "are not only competent, but duty-bound" to determine what procedures the Framers contemplated in stating that the Senate shall "try" an impeachment. *Id.* at 19a. Reaching the merits, he concluded that the Framers of the Constitution intended the Senate to have more procedural flexibility in conducting impeachment proceedings than a court has in a criminal trial and that historical practice confirms that view. *Id.* at 43a-54a. Judge Edwards noted that the validity of the Senate practice attacked here "seems especially clear" in light of the fact that petitioner conceded that he could be tried in the presence of only a small number of Senators, as long as it was done on the Senate floor. *Id.* at 56a-57a.[6]

ARGUMENT

The court of appeals correctly determined that petitioner's challenge to his conviction on articles of impeachment is nonjusticiable. There is no conflict between its decision and any decision of this Court or of any court of appeals. Additionally, as Judge Edwards concluded in his opinion concurring in the judgment, there is no merit to petitioner's underlying claim that the Constitution forbids the Senate from using a committee to compile an evidentiary record for the full Senate to consider in trying the impeachment. Further review is accordingly unwarranted.

1. Petitioner's claim that the Senate violated the Constitution by utilizing a committee to compile an evidentiary record is not justiciable because it asks the courts to review a determination that the Constitution plainly commits to the Senate alone. The Impeachment Trial Clause expressly instructs:

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[6] In a rehearing petition, petitioner's counsel challenged the precise nature of his concession on this point. After consulting the transcript of oral argument in the court of appeals, Judge Edwards denied the petition. Pet. App. 84a-85a.

> The Senate shall have the sole Power to try all Impeachments.

Art. I, § 3, Cl. 6. As the court of appeals explained, that Clause gives the Senate exclusive—and hence unreviewable—power to conduct impeachment trials. Pet. App. 4a, 16a. Accord *Ritter* v. *United States*, 84 Ct. Cl. 293, 296 (1936), cert. denied, 300 U.S. 668 (1937). The Constitution's grant of that authority necessarily gives the Senate sole authority to determine how evidence shall be taken for that body's use—a detail on which the Constitution is silent.[7]

That conclusion finds additional textual support in the Rulemaking Clause, which states that "[e]ach House may determine the Rules of its Proceedings." Art. I, § 5, Cl. 2. As this Court explained in *United States* v. *Ballin*, 144 U.S. 1 (1892), the Rulemaking Clause makes the procedures in each House "absolute and beyond the challenge of any other body or tribunal," so long as they do not "ignore constitutional restraints or violate fundamental rights." *Id.* at 5. Thus, even if the Impeachment Trial Clause did not itself commit the selection of impeachment trial procedures to the Senate, the Senate's adoption and use of Senate Impeachment Rule XI would be beyond judicial review under *Ballin*.[8]

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[7] As Judge Randolph explained:

> Apart from the requirements that the Senators take an oath, that the Chief Justice preside over impeachments of Presidents, and that two thirds of the Senators present must concur, the Constitution is silent about other procedural details. If the Senate did not have the sole power to determine how to conduct the proceedings, if the judiciary had the final say on what procedures the Senate must put in place, it is only a short step to judicial review of the Senate's compliance with those procedures. Once that dike bursts, there can be no holding back the flood of issues that inevitably will be presented to the courts.

Pet. App. 16a.

[8] The use and adoption of Rule XI plainly does not "ignore constitutional constraints." There is nothing in the Constitution that

Additionally, the history of the Impeachment Trial Clause confirms the political nature of the Senate's impeachment function, and, accordingly, the inappropriateness of subjecting the Senate procedures to judicial review. The Framers began with a bifurcated impeachment model, drawn from the English practice of bringing charges against an official in the House of Commons, with trial and judgment by the House of Lords. In the Constitutional Convention, several proposals were presented that impeachments should be tried by a special court or by this Court. See 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 185-186 (1966). After extensive consideration, the Framers decided instead to vest impeachment trial power in the Senate. *Id.* at 39, 46, 493, 552.

The Framers selected the Senate as the appropriate tribunal because impeachable offenses are "of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself," and therefore such trials "will seldom fail to agitate the passions of the whole community." *The Federalist No. 65* (A. Hamilton), at 426 (B. Wright ed. 1966).[9] Significantly, the Framers also selected the Senate rather than a court because they wanted impeachment to be independent of the criminal judicial process, and feared vesting both powers in the

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prohibits the Senate from designating a committee to compile the evidentiary record. Nor does the adoption and use of Rule XI "violate fundamental rights," particularly where the Senate allows the defending party to present and cross-examine witnesses in committee and to appear personally on the Senate floor. See discussion at pages 14-17, *infra*.

[9] Accord 1 J. Story, *Commentaries on the Constitution of the United States* § 746 (5th ed. 1905) ("the power partakes of a political character, as it respects injuries to the society in its political character").

same body. See 2 M. Farrand, *supra*, at 500.[10] Accordingly, although criminal conduct may be grounds for impeachment, a conviction on impeachment is necessary for, and entails only, removal from public office. The removal of an individual from public office is an inherently political action and the procedural issues involved in impeachment are a part of the political process. See Pet. App. 4a-8a.[11]

Not surprisingly, the courts have uniformly held that the type of claim raised by petitioner is nonjusticiable. As the Court of Claims explained in *Ritter* v. *United States*,

> when the provision that the Senate should have "the *sole* power to try all impeachments" was inserted in the Constitution, the word "sole" was used with a definite meaning and with the intention that no other tribunal should have any jurisdiction of the cases tried under the provisions with reference to impeachment.

84 Ct. Cl. at 296. See Pet. App. 4a. The result in *Ritter* is consistent with more recent court of appeals decisions finding textual commitment of other constitutional powers to the political branches.[12] In addition, various judges

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[10] See *The Federalist No. 65*, *supra*, at 428 ("by making the same persons judges in both cases, those who might happen to be the objects of prosecution would, in a great measure, be deprived of the double security intended them by a double trial"); see also 1 J. Story, *supra*, at § 786.

[11] This is precisely the type of matter that the Framers' contemporary, Chief Justice Marshall, identified in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803), as being beyond the ken of the courts. See also *Baker* v. *Carr*, 369 U.S. 186, 217 (1962); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 215 (1974).

[12] See *Morgan* v. *United States*, 801 F.2d 445, 447 (D.C. Cir. 1986), cert. denied, 480 U.S. 911 (1987) (it is "difficult to imagine a clearer case of textually demonstrable constitutional commitment" than the language that "[e]ach House shall be the Judge of the

of the United States District Court for the District of Columbia have rejected the specific argument petitioner presents here.[13]

Faced with the plain text and history of the Constitution and the unanimous adverse court decisions, petitioner attempts to find support for his position in this Court's decision in *Powell* v. *McCormack*, 395 U.S. 486 (1969). Pet. App. 14-15. The contrast between that case and this one, however, simply highlights the correctness of the rulings below. In *Powell*, this Court reviewed a claim by Representative Powell that the House of Representatives had exceeded its substantive constitutional power to judge the "qualifications" of its Members. See Art. I, § 5, Cl. 1. The Court ruled that the House had

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Elections, Returns and qualifications of its own Members." Art. I, § 5, Cl. 1); *McIntyre* v. *Fallahay*, 766 F.2d 1078, 1081 (7th Cir. 1985) (under Elections and Qualifications Clause, "[t]he House is not only 'Judge' but also final arbiter. Its decisions about which ballots count, and who won, are not reviewable in any court").

[13] Judge Gesell described as "mistaken" arguments advanced by former Judge Hastings and petitioner that they "have an individual right to an impeachment tried before the full Senate and that a federal district court may supervise the Senate's procedures for impeachment." *Hastings*, 716 F. Supp. at 40. See Pet. App. 72a. Earlier, Judge Harold Greene also had refused to review a similar challenge brought by former Judge Claiborne attacking the use of an evidentiary committee by the Senate in his impeachment trial: "The Senate's exercise of power to try impeachment is clearly not reviewable under the impeachment clause itself. Article I, section 3, clause 6 provides that the Senate shall have the 'sole' power to try all impeachments." Tr. at 4 in *Claiborne* v. *United States Senate*, Civ. No. 86-2780 (D.D.C. Oct. 8, 1986), appeal dismissed for lack of prosecution, No. 86-5622 (D.C. Cir. Mar. 23, 1987).

See also *In re Proceedings of Grand Jury No. 81-1*, 669 F. Supp. 1072, 1077-1078 (S.D. Fla.) (request by former Judge Hastings for access to evidentiary materials must be addressed to the proper Congressional authorities because "[t]he doctrine of the separation of powers * * * denies a court the power to dictate how the impeachment proceedings shall be conducted"), aff'd on other grounds, 833 F.2d 1438 (11th Cir. 1987).

erred by considering qualifications for membership beyond those "expressly set forth in the Constitution." 395 U.S. at 520-522, 548. The basis for the *Powell* holding was that "Article I, section 5 had no application, since the House action in question did *not* consist of judging 'qualifications' within the meaning of the provision." *Morgan* v. *United States*, 801 F.2d 445, 448 (D.C. Cir. 1986) (Scalia, J.), cert. denied, 480 U.S. 911 (1987).[14]

This Court's decision in *Powell* suggests, at most, only that judicial review might be available if the Senate were to exceed express textual limitations on its substantive impeachment powers: for example, if the Senate tried petitioner without prior House impeachment, Art. I, § 2, Cl. 5, or purported to impose a sanction more severe than removal or disqualification, Art. I, § 3, Cl. 7. But petitioner does not claim that the Senate lacked the power to try him or that it imposed an impermissible punishment. Rather, he is dissatisfied merely with the Senate's method of gathering evidence, and the Constitution does not specify what evidence gathering procedures the Senate shall employ. See Art. I, § 3, Cl. 6. Therefore, *Powell* —which did not involve congressional procedures at all— is of no assistance to petitioner.[15]

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[14] Furthermore, the Court carefully limited its justiciability holding in *Powell*; it was not asserting judicial power to review a Congressional "factual determination that a member did not meet one of the standing qualifications," which presented a question that "might still be barred by the political question doctrine." 395 U.S. at 521 n.42.

[15] Even if petitioner could surmount the nonjusticiability obstacle, his suit would encounter other jurisdictional barriers. The court of appeals did not reach the questions whether, assuming petitioner's suit is justiciable, he has identified an appropriate source for the waiver of sovereign immunity and whether the district court or the Claims Court would have subject matter jurisdiction over the dispute. See Pet. App. 15a n.3, 24a-27a. Additionally, to the extent that petitioner seeks reinstatement to the federal bench, it is far from clear that a court or the named respondents have the power to give him that relief.

2. If, as the courts have uniformly held, petitioner's claim is nonjusticiable, then that is the end of this matter. But even if petitioner's claim is justiciable, his arguments on the merits do not warrant plenary consideration by this Court. Petitioner's contention that the Senate cannot use a committee to compile an evidentiary record is plainly wrong for the reasons set forth in Judge Edward's opinion concurring in the judgment and in our brief in the court of appeals (at 39-70), which we summarize below.

a. Petitioner first asserts (Pet. 20) that the use of the verb "try" in the Impeachment Trial Clause somehow means that the Senate cannot use a committee to gather evidence. That argument, however, ignores the Framers' understanding and usage. As Judge Gesell observed in *Hastings* v. *United States Senate*, *supra*, (discussed at notes 2, 13, *supra*), "at the time the Constitution was drafted, definitions of 'try' included 'to sit in judgment' and 'to examine (a person) for the purpose of testing his qualifications.'" 716 F. Supp. at 40-41 (quoting *Oxford English Dictionary*). See Pet. App. 74a.[16] There is no evidence that the Framers intended, by using the word "try," to oblige the Senate to "grant[] the accused all the requirements of modern criminal due process," 716 F. Supp. at 40, or to dictate methods of evidentiary procedure. Plainly, "persons and bodies may sit in judgment without having received evidence in the manner Article III courts try criminal charges." *Id.* at 41. See Pet. App. 46a-47a.

b. Petitioner also contends (Pet. 20-21) that other clauses in the Constitution support his preferred usage. Those provisions, however, provide no basis for inferring that the Framers intended the word "try" in the Impeachment Trial Clause to have a more restrictive connotation than its then-accepted definition. Rather, the

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[16] See, *e.g.*, 2 M. Farrand, *supra*, at 67 (Rufus King) (the President, like members of Congress, "would periodically be *tried* for his behavior by his electors") (emphasis added).

constitutional provision providing for jury trials in criminal cases, which expressly excepts "Cases of Impeachment," Art. III, § 2, Cl. 3, reflects the Framers' understanding that in trying impeachments, the Senate "can never be tied down by such strict rules * * * as in common cases serve to limit the discretion of courts in favor of personal security." *The Federalist No. 65*, *supra*, at 428.[17] See Pet. App. 47a n.15.

c. Petitioner notes (Pet. 22-23) that the Framers gave the Senate final impeachment authority because it is a "numerous" body. That is true, but it hardly makes petitioner's point. The full Senate remains the "numerous" body that the Framers contemplated when it tries impeachments in accordance with its rules. It simply receives a complete record of testimonial and documentary evidence to assist it in reaching its judgment. The Framers' assignment of impeachment trials to the Senate did not reflect a decision that no fewer than 26 judges must hear witnesses testify in person or that the Senate could not assign a committee of its Members to prepare a written record of the testimony and evidence. See Pet. App. 54a-55a, n.19.

d. Petitioner next argues (Pet. 23-24) that the Senate's use of a committee is unconstitutional because it has only recently been utilized. As Judge Edwards explained, however, "all we know is that, for many years, the Senate apparently found it unnecessary even to consider using evidentiary committees in impeachment proceedings, and none was used." Pet. App. 50a. Moreover, the historical record refutes petitioner's claim that use

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[17] For example, a report of the Senate debate in the first impeachment trial, involving Senator William Blount, notes the statement of Senator James Ross that the proceeding "was not like a criminal prosecution in the forms of process * * *. It was neither a criminal nor civil prosecution but a trial by impeachment. The mode of proceeding was not according to the forms of the common law, but according to forms attached to that particular mode of trial." Aurora, Feb. 28, 1798, at 2, col. 2 (available in Library of Congress, Serial and Government Publications Division).

of a committee to gather evidence is a novel approach at odds with the early understanding. English impeachment practice was "[t]he model from which the idea of this institution has been borrowed." *The Federalist No. 65*, *supra*, at 427. The House of Lords had a long history of using committees to hear witnesses and compile evidence in impeachment trials.[18] Indeed, Thomas Jefferson described the House of Lords' impeachment trial procedures, including the practice of using committees, in a legislative manual that he prepared for the Senate's use when he served as its President from 1797 to 1801.[19] See Pet. App. 52a-54a. The historical record is reinforced by the Senate's longstanding use of evidentiary committees in performing its other quasi-judicial responsibilities.[20]

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[18] This history, which was well known to the Framers, may be traced at least as far back as the impeachment trial of Sir Francis Bacon in 1620, where the House of Lords "appointed a select Committee of themselves, to take Examination of Witnesses." *Proceedings in Parliament Against Francis Bacon* (1620), 2 State Trials 1087 (Howell ed. 1816). See also Williams, *The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials*, 50 N.Y.U.L. Rev. 512, 531 (1975).

[19] Jefferson explained in his manual that, in the House of Lords, "[t]he practice is to swear the witnesses in open House, and then examine them there: *or a committee may be named*, who shall examine them in committee, either on interrogatories agreed on in the House, or such as the committee in their discretion shall demand." *Jefferson's Parliamentary Writings: "Parliamentary Pocket-Book" and A Manual of Parliamentary Practice* 424 (W. Howell ed. 1988) (emphasis added).

[20] For example, when exercising its closely analogous power to discipline and expel its own Members, the Senate has long used committees to receive evidence. 7 Annals of Cong. 33-44 (1797) (expulsion of Senator William Blount in 1797). And, shortly before the Senate adopted Impeachment Rule XI, this Court approved the use of committees to receive evidence when "the Senate acts as a judicial tribunal" in judging elections and member qualifications. *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, 616 (1929). See also *Reed* v. *County Commissioners*, 277 U.S. 376, 388 (1928). Similarly, the Senate has long used committees to receive

d. Finally, petitioner contends (Pet. 25-26) that the use of committees for evidentiary purposes is "inherently unfair," and he attempts to demonstrate that assertion by a showing that Senators who are not serving on evidentiary committees vote in favor of conviction in higher numbers than those on such committees. Petitioner's comparison, however, provides no convincing indication of "unfairness" given the wide variety of factors that might explain that divergence. In any event, more than two-thirds of those Senators who served on the Committee voted to convict petitioner on Article I, and conviction on that Article alone was sufficient to remove him from office. See Pet. App. 23a n.3. Moreover, petitioner fails to explain how it would be more fair to have evidentiary proceedings before the "full" Senate, which would often mean that very few Senators would actually be in attendance, and which petitioner has conceded would be constitutional irrespective of partial attendance. See Pet. App. 56a-57a, 84a-85a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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evidence when performing the judicial task of trying legislative contempts. See *Groppi* v. *Leslie*, 404 U.S. 496, 501 (1972).

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